

REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT AT BUNGOMA
PETITION NO. 15 OF 2016

**IN THE MATTER OF ARTICLES 22,23,40(1), (2), (3), 43(c),47 AND
259 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF SECTIONS 107-115 OF THE LAND ACT NO.6
OF 2012**

AND

**IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION
OF KENYA 2010**

BETWEEN

**DAVID MURAMBI, AQUINAS WANYONYI AND ANTHONY
WANYONYI (suing on behalf of the estate of the late VINCENT
WANYONYI MURAMBI.....PETITIONERS**

VERSUS

**THE COUNTY GOVERNMENT OF BUNGOMA.....1ST RESPONDENTS
KIBABII UNIVERSITY.....2ND RESPONDENTS**

RULING

1. The Petitioners approached this court through the Notice of Motion under certificate of urgency, dated 13th February, 2024 seeking the following orders: -
 - a) Spent.

- b) That the honourable court be pleased to grant the Petitioners leave to discontinue and or withdraw the current petition in its entirety as against the respondents.
- c) That this honourable court do arrest the delivery of judgment set for 14th March 2024, and adopt the Notice of Withdrawal dated 3rd November, 2023, seeking withdrawal of the entire petition dated 30th December 2016 and filed on the same date, as an order of this court.
- d) That the costs of this application be provided for.

2. The application is supported by the affidavit of Cynthia Omuya Counsel for the Petitioner/Applicant sworn on 13th February, 2024 and twelve (12) grounds shown on the face of the said application listed as (1) to (12) respectively. In her supporting affidavit, the applicant deposed that the petition was premised on the ground that the 2nd respondent was the owner of the suit property title number E.BUKUSU/W.KANDUYI/1660 located along Bungoma-Chwele Road and which property abuts land title number E.BUKUSU/W.KANDUYI/1659 which belongs to the petitioners and which they claim the respondents drilled and created an open road.

3. She stated that during the hearing, the 2nd respondent's witness testified that they were not the owners of title number E.BUKUSU/W.KANDUYI/1660 and that they had no interest in creating any road thereon. She further deposed that the petitioners claim was based on the assumption that land title number E.BUKUSU/W.KANDUYI/1660 belonged to the 2nd respondent and with

the new information that had come to light, they wish to discontinue the matter and have it withdrawn in its entirety.

4. The deponent also stated that they filed their notice of withdrawal on 3rd November, 2023 but the same was not brought to the attention of the trial Judge who being oblivious of the withdrawal Notice proceeded and gave directions on a judgment date. She stated that no prejudice would be suffered if the said application is allowed and urged the court to allow same.

5. An affidavit of service filed in court indicated that the application was served upon the respondents. However, the respondents did not file any response to the application. After being satisfied that the respondents were duly served with the said application, this Court directed that the said application to proceed ex-parte.

6. Although the application is unopposed, it is the duty of this Court to subject it to a merit evaluation in accordance with the applicable laws and principles. Indeed, in Gideon Sitelu Konchellah vs. Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR the Supreme Court of Kenya held that:

“...as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under

a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court..."

7. By way of background, the petitioner filed the petition herein on 30th December, 2016 where she sought the following reliefs against the respondents;

- a) A declaration that the respondents conduct jointly and severally was in breach of the constitutional rights of the petitioners and beneficiaries of the estate of the deceased.**
- b) That a permanent injunction do issue restraining the respondents either by themselves, servants, agents, employees, assignees, students, proxies and/or representatives from trespassing, walking through, driving through, parking, interfering with crops, up-rooting crops or in any way whatsoever interfering with title number East Bukusu/ West Kanduyi/1659.**
- c) That the respondents be condemned to pay general damages.**
- d) That the respondents be condemned to pay special damages.**
- e) That the respondents be condemned to pay exemplary damages.**

- f) That the respondents be condemned to pay costs of this petition.**
- g) That any other relief that this Honourable Court may deem just and fair to order.**

8. Upon being served with the petition, the 1st respondent filed a replying affidavit sworn by one ROBERT JUMA SIMIYU, Chief Officer in charge of lands, Urban and Physical Planning in the County Government of Bungoma. The applicant deposed that on 24th November 2016, the 2nd respondent held its inaugural graduation ceremony which was graced by the then president Uhuru Kenyatta and in the course of preparing for the said ceremony, the 2nd respondent requested the 1st respondent to smoothen and widen the narrow marram road passing outside its gate. That the said road was about 9Metres in width and has always been in existence even before the filing of this petition. That prior to the said ceremony, the 2nd respondent had made arrangements with neighboring schools as well as other adjacent institutions for provision of parking space and sufficient traffic officers were deployed to direct both human and vehicular traffic. He deposed that If at all any members of the public parked his/her vehicle on the Petitioner's property, they did so on their own volition and not at the instance or direction of the 1st respondent. The deponent further stated that the petitioner had not placed any material of the alleged damage to crops before court.

9. The 2nd respondent also filed a replying affidavit sworn by one DAVID BUTALI NAMASAKA, the administrative Registrar on 28th March, 2017. The said David Butali Namasaka deposed that the 2nd respondent

is the registered proprietor of E.BUKUSU/N.KANDUYI/2388 measuring 28.3 Ha and that on 24th November, 2016 they held their inaugural graduation ceremony and requested the 1st respondent to smoothen and widen the road passing behind its gate. He stated that the said road was an existing road and denied that the 2nd respondents had compulsorily acquired the suit land to create the said Road and added that should the need to do so arise in the future, the laid down legal procedures would be followed.

10. After pleadings were closed, parties confirmed to have complied with pre-trial directions after which the matter was set down for hearing. The suit was heard on various dates between 16th October, 2023 and 4th December, 2023. The petitioners in their current application alleges that on 3rd November 2023, they filed and served a notice of withdrawal of the Petition herein in its entirety but the said notice was not is said not placed before the honourable Judge for action. She stated that when this Petition came up for further hearing on 4th December 2023, the counsel on record did not appear in court due to technical challenges and she did not address the court on the issue of the notice to withdraw, necessitating the filing of the current application.

11. I have considered the application and the supporting affidavit. I have also perused the pleadings and proceedings on record. The issue that arise for determination in this application is whether leave can be granted to the Petitioner to withdraw this Petition and who will bear the costs?. Order 25 of the Civil Procedure Rules provides for withdrawal of suits as follows;

(1) At any time before the setting down of the suit for hearing, the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

(2) (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing, the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit and otherwise, as are just.”

12. The Court of Appeal dissected this provision in the case of *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [2015] eKLR where they set out circumstances under which a Notice of Withdrawal takes effect as follows: *“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the*

suit has been set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality."

13. Angote J in Republic v Export Processing Zones Authority & 2 others; London Distillers (K) Ltd & 3 others (Interested Parties) Ex parte Erdermann Property Limited [2020] eKLR stated as follows;

"As a general proposition, the right of a party to discontinue a suit or withdraw his claim, where the same has not been set down for hearing, cannot be questioned. Indeed, a court of law cannot force an unwilling Plaintiff/Applicant to continue with a cause of action because, even if the court insists that he should continue, he may well refuse to tender evidence or take any further steps in the action. See Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others, SC App. No. 16 of 2014"

14. I agree with the decision by the Court of appeal on the circumstances surrounding the withdrawal and discontinuance of a suit and also subscribe to the persuasive decision by *Angote J* in the subsequent case where he acknowledged that there are instances in which a court can decline an application for withdrawal and discontinuance of a suit. In the *Beijing case(supra)*, the court of appeal considered the circumstances surrounding the discontinuance of the case while contempt of court proceedings were still pending and the filing by the respondent of a new suit the very next day raising exactly the same issues as those in the suit it had discontinued. The court was of the view that where a party uses the right to discontinue a suit in manner that amounts to abuse of the process of court or to defeat the ends of justice, the court has power to stop such abuse or undermining of justice.

15. According to the petitioner, the reason for seeking to withdraw and discontinue with this petition is contained in paragraph 4 of the supporting affidavit where she deposed as follows;

"4. THAT during the hearing of the petition that took place on 16th October, 2023, the 2nd Respondent testified under oath and indicated that they were not owners of of E.BUKUSU/W.KANDUYI/1660 and therefore had no interest in creating an open road on title number E.BUKUSU/W.KANDUYI/1659 (suit land).

5. THAT the petitioner brought the suit against the 2nd Respondent as they were all along under the presumption that

the suit property title Number E.BUKUSU/W.KANDUYI/1660 belonged to the 2nd Respondent, as there is a gate on the property that the public uses to access the university.

6. THAT in light of the above position and testimony of the 2nd Respondent, the petitioner filed and served a Notice of withdrawal on 3rd November 2023, seeking to have the petition withdrawn in its entirety. Annexed hereto and marked CO-1 is a copy of the Notice of withdrawal.’’

The reasons given by the petitioner for the withdrawal of this petition is that during the hearing of the petition on 16th October 2023, the 2nd Respondent through her witness stated on oath that they were not owners of E.BUKUSU/W.KANDUYI/1660. She stated that all along, they were under the presumption that the suit property belonged to them. The admission by the petitioner is a clear indication that they did not conduct an official search to establish the proprietorship of the suit property before filing this petition. I also note that under the Civil Procedure Rules, parties are required to disclose their evidence by filing and serving compliance documents upon the opposite party which include witness statements and list of documents under order 3, 7 and 11 CPR. The petitioner must have been served by the 2nd Respondent with the witness statement by the witness who testified on 16th October, 2023. It was therefore incumbent upon the petitioner to check that contents of all witness statements and any other documents supplied by the opposite parties and determine whether their claim was still sustainable. I find that in light of her admission, this petition against the respondents was based on suspicion and conjecture. I also note that this application is made in

bad faith with intention to steal a march against the Respondents. The Petitioner must have realized that their claim was crumbling and wanted an escape route by withdrawing this petition. The Court in determining an application such as the one before me must ask itself whether it will facilitate expeditious disposal of the dispute between the parties. Put it differently, Is it proportionate for the Petitioner to just take a walk at this stage of the suit? Will it facilitate affordable resolution? The petitioner must lay out a case known in Law. Under **Order 25 Rule 2(2)**, leave of court is mandatory before a suit is withdrawn. In the absence of a consent between the parties, there is no walking away without leave of court. Under the abovementioned rule, the grant of leave is discretionary as the wording of the rule uses the word “**may**” and is not an automatic right. Therefore, the power to grant leave must be exercised judiciously and the court must take account the history and the circumstances surrounding the case.

16. In that regard, this Court shall not shy away and turn a blind eye where the circumstances denote glaring injustice being perpetrated upon the respondents who have faithfully attended court since the year 2016 when this petition was filed, participated in filing pleadings and court proceedings including the hearing of the petition to the point of submitting on the issues raised in the claim only for the petitioner to walk away.

17. The law gives the courts inherent power to do substantial justice. The House of Lords in **CASTANHO V. BROWN & ROOT (UK) LTD &**

ANOTHER (1981) 1 ALL ER 143 held that termination of legal process such as a notice of discontinuance, like any other step in the process, could be used by a party to obtain a collateral advantage which would be unjust for him to retain and could therefore be prevented by the court under its inherent jurisdiction to prevent an abuse of the process of the court. Speaking for the House, **Lord Scarman** stated:

“The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain; and termination of the process can, like in any other step in the process, be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court.”

18. It is therefore my considered view that proceedings in this suit had commenced in the strict sense and steps had been taken in concluding the suit since parties had tendered their evidence viva voce, closed their respective cases, directions on filing of submissions taken and the matter fixed for judgment. As can be seen from the record, the 2nd respondent had also filed his submissions which are dated 9th February, 2024 in obedience to the court’s directions issued on 4th December, 2023.

19. The justification for withdrawal and discontinuance of this petition as stated by the petitioner is that their case was built on the assumption that the suit property title number E.Bukusu/W.Kanduyi/1660 belonged

to the 2nd respondent, as there was a gate on the property that the public uses to access the university. It follows therefore that with the 2nd respondent's witness having testified that they did not own the suit property, the petitioners realized that their case was crumbling and not going anywhere, therefore opted to withdraw the petition. That step by the petitioner in my view is too little too late. This court takes cognizance that a party can indeed withdraw its case upon realizing that it has no sufficient evidence to sustain the same. However, that right can only be exercised before the suit is set down for hearing. Where a claimant is supplied with compliance documents under Order 7 & 11 CPR and realizes that his claim is weak, he has a right to withdraw and discontinue its suit. The circumstances under which the withdrawal of this petition is being made indicates that the same was an afterthought and therefore must fail.

20. Further, the court had also deployed its resources such as precious judicial time since the year 2016 when this petition was filed. Under **Section 3A** of the Civil Procedure Act, this Court has inherent power to make such orders as may be necessary for the ends of justice, to prevent abuse of the process of court.

21. In view of the matters aforementioned, I find that the application dated 13th February, 2024 is devoid of merit and since the respondents did not file any response, the same is hereby dismissed with no order as to costs.

DATED and **SIGNED** and **DELIVERD** at **BUNGOMA** this 14th day of
March, 2024.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. M/S Nekoye for Omuya for Petitioners
2. Mr. Wangila for 1st & 2nd Respondents
3. Bett C/A